M Chandra Segar a/l Muniandy v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-05–139 OF 2011
ABDUL MALIK ISHAK, AZAHAR MOHAMED AND ZAWAWI SALLEH JJCA
11 OCTOBER 2013

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Criminal Procedure — Appeal — Appeal against sentence — Accused convicted for offence of trafficking in dangerous drugs — Accused sentenced to death — Whether defence cast reasonable doubt on prosecution's case — Whether judge appreciated defence case sufficiently — Dangerous Drugs Act 1952 s 39B(1)(a)

D

Evidence — Witness — Informer — Drugs trafficking activity came to police's knowledge by virtue of information by informer — Non-calling of informer — Whether fatal to prosecution's case — Protection of informers under law

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In the High Court, the appellant was charged for trafficking in 2,668g of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). Acting upon information received that a certain drug trafficking activity would take place, SP3 had acted as agent provocateur and met an informer who later introduced SP3 to the appellant. The appellant offered to sell 3kg of cannabis to SP3 at RM2,200 per kg and gave his telephone number to the latter. SP3 contacted the appellant with regard to the supply of cannabis and arranged for a meeting. On the said night, SP3 came with the informer while the appellant arrived on a motorcycle with another Indian person as pillion, who according to the appellant did not know anything. When the pillion and informer were about three meters away, leaving the appellant and SP3 together, the appellant asked for the money and SP3 showed him the RM6,000 which he brought. The appellant then rode on the motorcycle to fetch the cannabis and returned five minutes later with the said drugs. SP3 quickly caught hold of the appellant and shouted 'polis'. The appellant was arrested while his friend fled. The appellant's defence was that the actual trafficker was one Thanasegaran who was the owner and rider of the motorcycle. According to the appellant, he was riding pillion with Thanasegaran and when they arrived at the scene, the latter alighted from the motorcycle and was seen talking to someone on his handphone. About 2–3 minutes later, two men emerged and Thanasegaran then took a plastic bag from the carrier of the motorcycle and proceeded towards the two men. The appellant was pushing the motorcycle towards a tree when he was caught while Thanasegaran managed to escape. It was the appellant contention that he did not have any handphone with him and the number which SP3 took belonged

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to Thanasegaran. At the end of the defence case, the trial judge convicted the appellant as per charge and sentenced him to death. In the present appeal, the appellant argued that the non-calling of the informer was fatal to the prosecution case; and that the judge misdirected himself when he failed to sufficiently appreciate the defence case.

Held, dismissing the appeal:

(1) The prosecution was at all time acting in good faith in not calling or offering the informer for cross-examination. They were aimed at protecting the identity of the police informer. The protection of an informer is of fundamental importance to the working of a criminal justice system. Its rationale is to protect those who provide confidential information to the police from the risk of retribution, and more generally to encourage cooperation for future informers (see paras 25–26).

(2) The informer had not assumed the role of an agent provocateur as his role was restricted to introducing SP3 to the appellant. He was not involved in any negotiations as to the type of drugs, quantity of drugs and the purchase price between the parties. Granted that both SP3 and SP4 did not deny that the informer was at the scene right from the beginning when he introduced SP3 to the appellant till the arrest of the appellant, nonetheless, the informer did nothing else apart from being present all the way. In any ordinary circumstances, the presence of the informer throughout the entire transaction would be able to lend credence to the dealing so as not to hit the suspicion button of either parties in the transaction (see para 32).

(3) The trial judge had considered sufficiently the material evidence given on behalf of the defence, and having weighed it against the prosecution's case, he had come to the correct conclusion that the appellant's defence had not raised any reasonable doubt in the prosecution's case. It was not necessary for the learned trial judge to make a specific finding whether Thanasegaran was a real trafficker or not because the identity of the person who negotiated the sale with SP3 and delivered the cannabis was not in doubt. That being the case, whether Thanasegaran was the real trafficker was immaterial (see paras 37 & 39).

(4) There was no credible evidence from which the court could infer that Thanasegaran was the real trafficker. The uncontroverted evidence showed that the negotiations and telephone conversation regarding the selling of the cannabis were held between SP3 and the appellant. There was in fact delivery of the supply of the cannabis to SP3 by the appellant. The evidence of SP3 was corroborated by SP6 who testified that it was the appellant who orchestrated the whole plan and arranged for the delivery of the cannabis (see para 42).

(5) The finding of the trial judge was amply supported by evidence and could not be assailed. While the trial judge erred in law in not considering the appellant's cautioned statement, this error did not occasion any miscarriage of justice, given the fact that the contents of the cautioned statement were similar to the defence put forth by the appellant during the trial and given the fact that there was overwhelming evidence connecting the appellant with subject matter of charge (see para 54).

[Bahasa Malaysia summary

Di Mahkamah Tinggi, perayu dituduh mengedar 2,668g kanabis, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Bertindak atas maklumat yang diterima bahawa satu aktiviti pengedaran dadah akan dijalankan, SP3 telah bertindak sebagai ejen perangkap dan bertemu dengan seorang pemberi maklumat yang seterusnya memperkenalkan SP3 kepada perayu. Perayu menawarkan untuk menjual 3kg kanabis kepada SP3 dengan harga RM2,200 sekilo dan memberikan nombor telefonnya kepada SP3. SP3 menghubungi perayu berkenaan pembekalan kanabis dan mengaturkan satu pertemuan. Pada malam tersebut, SP3 hadir bersama-sama dengan pemberi maklumat sementara perayu tiba dengan motosikal bersama-sama seorang lagi pembonceng berbangsa India, yang mana menurut perayu, tidak tahu-menahu mengenai apa-apa. Apabila pembonceng dan pemberi maklumat berada dalam jarak tiga meter jauh, meninggalkan perayu dan SP3 bersama-sama, perayu meminta wang dan SP3 menunjukkan RM6,000 yang dibawanya. Perayu kemudiannya menunggang motosikal untuk mendapatkan kanabis dan kembali lima minit kemudian dengan dadah tersebut. SP3 dengan segera memberkas perayu dan menjerit 'polis'. Perayu ditangkap manakala rakannya terlepas. Pembelaan perayu adalah bahawa pengedar sebenar adalah seorang yang bernama Thanasegaran yang merupakan pemilik dan penunggang motosikal tersebut. Menurut perayu, dia membonceng bersama-sama dengan Thanasegaran dan apabila tiba di tempat kejadian, Thanasegaran turun daripada motosikal dan dilihat sedang bercakap dengan seseorang melalui telefon bimbitnya. Lebih kurang 2–3 minit kemudian, dua orang lelaki muncul dan Thanasegaran kemudiannya mengambil satu beg plastik daripada bakul motosikal dan terus menuju ke dua orang lelaki tersebut. Perayu sedang menolak motosikal tersebut ke sebatang pokok apabila dia ditangkap manakala Thanasegaran berjaya melepaskan diri. Adalah menjadi hujahan perayu bahawa dia tidak membawa apa-apa telefon bimbit dengannya dan nombor yang diambil oleh SP3 adalah milik Thanasegaran. Di akhir kes pendakwaan, hakim bicara menyabitkan perayu atas pertuduhan dan menjatuhkan hukuman mati ke atasnya. Dalam rayuan ini, perayu menghujahkan bahawa tindakan tidak memanggil pemberi maklumat menjejaskan kes pendakwaan; dan bahawa hakim tersalah arah diri beliau apabila beliau gagal mempertimbangkan kes pembelaan dengan secukupnya.

Diputuskan, menolak rayuan:

(1) Pihak pendakwaan bertindak secara suci hati dalam tidak memanggil

atau menawarkan pemberi maklumat bagi pemeriksaan balas. Ia bertujuan untuk melindungi identiti pemberi maklumat polis. Perlindungan pemberi maklumat adalah satu kepentingan asas bagi perjalanan sistem keadilan jenayah. Tujuannya adalah untuk melindungi mereka yang memberikan maklumat sulit kepada polis daripada risiko balasan, dan secara umumnya untuk menggalakkan kerjasama pemberi maklumat di masa hadapan (lihat perenggan 25–26).

(2) Pemberi maklumat tidak mengambil alih peranan ejen perangkap kerana peranannya terhad kepada memperkenalkan SP3 kepada perayu sahaja. Dia tidak terlibat dalam sebarang rundingan mengenai jenis dan kuantiti dadah dan harga belian antara pihak-pihak. SP3 dan SP4 tidak menafikan bahawa pemberi maklumat berada di tempat kejadian daripada awal lagi apabila dia memperkenalkan SP3 kepada perayu hinggalah tangkapan perayu, walau bagaimanapun, pemberi maklumat tidak melakukan yang lain selain daripada hadir di situ sepanjang masa. Dalam hal keadaan biasa, kehadiran pemberi maklumat sepanjang transaksi tersebut memberi kepercayaan kepada urusan tersebut untuk tidak membangkitkan syak wasangka antara pihak-pihak dalam transaksi (lihat perenggan 32).

(3) Hakim bicara telah mempertimbangkan keterangan material bagi pembelaan dengan secukupnya dan selepas menimbangkannya dengan kes pendakwaan, beliau telah dengan betul memutuskan bahawa pembelaan defendan tidak membangkitkan apa-apa keraguan munasabah dalam kes pendakwaan. Adalah tidak perlu bagi hakim bicara untuk membuat dapatan khusus tentang sama ada Thanasegaran adalah pengedar sebenar atau tidak kerana identiti orang yang berunding mengenai jualan dengan SP3 dan menghantar kanabis tersebut tidak diragui. Oleh itu, sama ada Thanasegaran adalah pengedar sebenar adalah tidak material (lihat perenggan 37 & 39).

(4) Tiada keterangan kredibel yang mana mahkamah boleh membuat kesimpulan bahawa Thanasegaran adalah pengedar sebenar. Keterangan yang tidak boleh disangkal adalah bahawa rundingan dan perbualan telefon mengenai jualan kanabis adalah antara SP3 dan perayu. Malahan terdapat penghantaran pembekalan kanabis kepada SP3 oleh perayu. Keterangan SP3 disokong oleh SP6 yang memberi keterangan bahawa perayu yang merancang penghantaran kanabis (lihat perenggan 42).

(5) Dapatan hakim bicara disokong oleh banyak keterangan dan tidak boleh dipatahkan. Walaupun hakim bicara terkhilaf secara undang-undang dalam tidak mempertimbangkan pernyataan beramaran perayu, kekhilafan ini tidak menyebabkan ketidakadilan, kerana fakta bahawa kandungan pernyataan beramaran tersebut adalah sama dengan pembelaan yang dikemukakan oleh perayu ketika perbicaraan dan

kerana terdapat banyak keterangan yang mengaitkan perayu dengan hal perkara pertuduhan (lihat perenggan 54).]

Notes

For cases on appeal against sentence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 225–235.

For cases on informer, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3305–3308.

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP [1987] 2 MLJ 336; [1987] 1 CLJ 540; [1987] CLJ (Rep) 241, SC (refd)

Aedy bin Osman v PP [2010] 1 MLJ 810; [2011] 1 CLJ 273, CA (refd)

Chan Chor Shuh v PP [2003] 2 MLJ 26; [2008] 1 CLJ 501, CA (refd)

Ghazalee Kassim & Ors v PP [2009] MLJU 402; [2009] 4 CLJ 737, FC (refd)

Kamalahassan a/l Latchimanan v PP [2008] 4 AMR 481, CA (refd)

Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265; [1994] 2 CLJ 151, SC (refd)

Lee Lee Cong v PP [1998] 4 MLJ 697; [1999] 1 AMR 925, CA (refd)

Mohamed Ismail bin Sahul Hameed v Pendakwa Raya (Criminal Appeal No P05–193 of 2010) (unreported), CA (refd)

Munusamy Vengadasalam v PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221, SC (refd)

Munusamy v PP [1987] 1 MLJ 492, SC (refd)

PP v Adetunji Adeleye Sule [1993] 2 MLJ 70, SC (refd)

PP v Chan Kim Choi [1989] 1 MLJ 404, HC (refd)

PP v Chong Chee Kin & Anor [1995] 2 MLJ 679, HC (refd)

PP v Ishak bin Hj Shaari & other appeals [2003] 4 MLJ 585; [2003] 3 CLJ 843, CA (refd)

PP v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560; [1997] 1 CLJ 233, FC (refd)

PP v Monoharan a/l Ratnasamy [1989] 1 MLJ 504, HC (refd)

PP v Padi bin Abdullah [1989] 2 MLJ 60, HC (refd)

PP v Sivakumar Ammasi [2003] 6 CLJ 152, HC (refd)

R v Barros [2011] 273 CCC (3rd) 129 (refd)

Tarmizi bin Yacob & Anor v PP and another appeal [2011] 4 MLJ 1, FC (refd)

Ti Chuee Hiang v PP [1995] 2 MLJ 433; [1995] 3 CLJ 1, SC (refd)

Tunde Apatira & Ors v PP [2001] 1 MLJ 259; [2001] 1 CLJ 381, FC (refd)

Wan Mohd Azman bin Hassan @ Wan Ali v PP [2010] 2 AMR 834, FC (refd)

Wan Yurillhami bin Wan Yaacob & Anor v PP [2010] 1 MLJ 749; [2010] 1 CLJ 1, FC (refd)

Yee Wen Chin v PP [2008] 6 MLJ 222; [2008] 6 CLJ 773, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60(1)
Dangerous Drugs Act 1952 ss 39B(1)(a), 39B(2), 40
Evidence Act 1950 s 114 (g)

Appeal from: Criminal Trial No 45–02 of 2007 (High Court, Taiping)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Kwan Li Sa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant was charged and tried in the High Court of Taiping for trafficking in dangerous drug, to wit, 2,668g of cannabis, an offence in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and punishable under s 39B(2) of the DDA. The appellant claimed trial to the charge. At the conclusion of the trial, the appellant was found guilty. He was then convicted and sentenced to death by hanging as mandated by the law.

[2] Aggrieved by the decision, the appellant has now appealed to this court urging reversal of the High Court's decision.

[3] At the end of the hearing of the appeal, we dismissed the appellant's appeal and affirmed the decision of the High Court. The reasons for our decision now follow.

THE CHARGE

[4] The charge, worded in the Malay language, was as follows:

> Bahawa kamu pada 15 Mei 2006, jam lebih kurang 11.30 malam, di Jalan Tanah Merah, Kampung Simpang Halt, Simpang Taiping, di dalam Daerah Larut Matang dan Selama, Negeri Perak, kamu didapati mengedar dadah berbahaya iaitu 2,668 gram Cannabis, dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

THE FACTS

[5] The relevant facts, eschewing unnecessary details, may be summarised thus: based upon the information received about drug trafficking activities in

Taiping, Insp Mat Nawi bin Abdul Rahman ('SP6') had instructed Sub Inspector Busra bin Abd Kadir ('SP3') to act as agent provocateur in a 'buy-bust operation'. A

[6] On 9 May 2006, SP3 went to Taiping and met with an informer. The informer agreed to introduce SP3 to the target, who was suspected of being a drug trafficker. At about 10pm, the informer had brought SP3 on motorcycle to meet the target. The target was later identified as the appellant. B

[7] When SP3 met the appellant, the appellant offered to sell 3kg of cannabis to SP3 at RM2,200 per kg. At this meeting, the appellant gave his handphone No 016–5416948 to SP3. A proposed meeting for 13 May 2006 never materialised. C

[8] On 15 May 2006, SP3 contacted the appellant with regard to the supply of the cannabis. The delivery was then agreed to take place at Kampung Simpang Halt and the appellant agreed to reduce the price to RM2,000 per kilogramme. SP3 then informed SP6 of the progress of his dealing with the appellant. An arresting party was then organised by SP6. D

[9] At about 9.40pm that night, SP3 received a call from the appellant asking him whether he wanted to collect the cannabis. The place of delivery was then agreed upon. SP6 and his men then left for the scene, which was Jalan Tanah Merah, Kampung Simpang Halt, Taiping. E F

[10] At about 11.00pm, SP3 reached the scene. He went there together with the informer on a motorcycle. Upon arrival, SP3 telephoned the appellant. The appellant came on a motorcycle bearing registration No AFS 7003 with another Indian person as pillion. When asked by SP3 who was the pillion, the appellant said that he was his friend and that he did not know anything. At the request of the appellant, all four of them then proceeded about 80 meters further inside the Tanah Merah for fear of being watched. It was SP3's narrative that at this point of time both the appellant's friend and informer were about 3 meters away, leaving the appellant and SP3 together. SP3 then asked the appellant for the cannabis and the appellant replied: 'di luar sana'. The appellant asked for the money. SP3 showed him the RM6,000. The appellant responded by telling SP3 that he would go and fetch the cannabis. The appellant then left on the motorcycle. About 5 minutes later the appellant returned. The appellant then handed to SP3 a white plastic bag and said: *cukup tiga*. SP3 quickly caught hold of the appellant and shouted: *Polis*. The appellant was arrested. The appellant's friend fled. The informer also fled. On examination of the plastic bag, SP6 found three compressed slabs which formed the subject matter of the charge. G H I

[11] At the end of the prosecution case, the learned trial judge ruled that a prima facie case had been made out against the appellant. He was then called to enter his defence.

[12] The appellant gave evidence on oath. In essence, the defence of the appellant was that the actual trafficker was one Thanasegaran. According to the appellant, Thanasegaran was not a fictitious character and was the owner and rider of the motorcycle.

[13] The appellant explained that he was with the company of Thanasegaran as he wanted to smoke ganja with him, Thanasegaran having picked up the appellant from the house of DW3, the appellant's grandmother. Thanasegaran is also known as 'Ayya' or 'Boy'. The appellant was riding pillion and a short while later they arrived at the scene. Thanasegaran then alighted from the motorcycle and was then seen talking to someone on his handphone and the appellant heard him saying: 'hello maca, kamu di mana sekarang? Saya telah sampai dan membawa ganja'. About 2–3 minutes later two men emerged and Thanasegaran then took a plastic bag from the carrier of the motorcycle and proceeded towards the two men. The appellant pushed the motorcycle towards a tree and at that point of time he heard: 'Polis'. The appellant was then arrested from behind whilst Thanasegaran managed to escape.

[14] The appellant denied that he had any handphone with him and the handphone No 016–5416948 was not his but Thanasegaran's.

[15] The appellant called five other witnesses. DW2 is his wife who testified that the handphone line No 016–5416948 was not the appellant's and that the appellant never rode the motorcycle No AFS 7003.

[16] DW3, is the grandmother of the appellant who testified that the appellant came to her house on the said day at about 10pm and at about 11pm, 'Ayya' came on a motorcycle and the appellant went out with him.

[17] DW4 confirmed that he sold the said motorcycle bearing No AFS 7003 to Thanasegaran and he produced exh D25 to show that the motorcycle was sold to Thanasegaran, whose contact number was 016–5416948.

[18] DW5 is the younger brother of the appellant who also testified that the telephone line No 016–5416948 belonged to Thanasegaran and that motorcycle No AFS 7003 also belonged to Thanasegaran.

[19] DW6 is ASP Mohd Nordin bin Abdullah who confirmed that he

lodged Simpang Rpt 4541/10, relating to the arrest of Thanasegaran, on 1 November 2010. The said report and arrest was confirmed by DW7 (Insp Suhaini bin Mohamad).

[20] DW8 is the younger sister of Thanasegaran who said, inter alia, that Thanasegaran was also known as 'Ayya' and that his handphone line No was 016–5416948. She further testified that the police came on the night of 15 May 2006 to search the house and look for Thanasegaran.

THE APPEAL

[21] The conviction of the appellant was assailed on several grounds, but before us, learned counsel for the appellant has confined his arguments to the following grounds:

(a) that the learned trial judge erred when he failed to realise that the failure by the prosecution to call or offer the informer for cross-examination has compromised the case for the prosecution, and

(b) that the learned trial judge misdirected himself when he failed to sufficiently appreciate the defence case.

Ground (a)

[22] Learned counsel for the appellant submitted that the non-calling of the informer was fatal to the prosecution case. According to learned counsel, the informer was not just an informer but had crossed the line and assumed the mantle of an agent provocateur. Learned counsel invited the court's attention to the following roles played by the appellant:

(a) On 9 May 2006 at the Hotel Meridien, at 9pm, SP3 was introduced to the informer who then informed SP3 of the background and activities of the target (p 35 of the appeal record 'AR');

(b) SP6 then instructed the informer to get in touch with the target. The informer then got in touch with the target and informed that the target agreed to meet and asked the informer to bring SP3 to the junction of Jalan Besar Simpang and Pulau Pinang (p 35 AR);

(c) The informer then brought SP3 to meet the target and upon reaching the meeting place, the informer called the target (p 36 AR);

(d) When the target came the informer introduced SP3 to the target and according to SP3: … Kami bertiga dalam keadaan berdiri telah berbincang mengenai bekalan ganja …, although SP3 later said the informer was not involved in the negotiations (p 36 AR);

(e) After the negotiations, both SP3 and the informer then returned to the hotel (p 37 AR);

(f) On 15 May 2006, SP3 was instructed to go to the scene with the informer. In fact, the informer had waited for the police arresting party at Hotel Meridien (p 39 AR);

(g) After SP3 had been informed by SP6 that the police party had taken up ambush positions, SP3 and the informer too left for the scene with the informer riding the motorcycle and SP3 as pillion (p 40 AR);

(h) After the arrival of the appellant and his friend, both the informer and SP3 followed the appellant to a spot about 80 meters away (p 41 AR);

(i) The informer was then instructed by SP3 to excuse himself to keep the appellant's friend company and to leave both SP3 and the appellant (p 42 AR);

(j) When the appellant left to collect the ganja, the informer was still with the appellant's friend (p 43 AR); and

(k) When the appellant was arrested, both the informer and the appellant's friend fled (p 43 AR).

[23] In support of his submission, reliance was placed on the following cases:

(a) *Wan Mohd Azman bin Hassan @ Wan Ali v Public Prosecutor* [2010] 4 MLJ 141; [2010] 2 AMR 834;

(b) *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433; and

(c) *Kamalahassan a/l Latchimanan v Public Prosecutor* [2008] 3 MLJ 810; [2008] 4 AMR 481.

[24] With respect, we saw no merit in this submission. The submission is against the weight of the evidence. It is trite that whether a person is an informer or has become an agent provocateur would depend on the facts of each case. (See *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; *Ghazalee bin Kasim v Public Prosecutor* [2009] MLJU 402; [2009] 4 CLJ 737). In this regard, an objective assessment of the role played by that person in all circumstances of the particular case is required. In other words, the court must scrutinise the facts of the particular case and determine the degree of the person's participation, particularly in the controlled sale and delivery of the drugs. In *Kamalahassan a/l Latchimanan v Public Prosecutor*, Suriyadi Halim Omar JCA (as His Lordship then was) held that:

> Currently, in a police operation where an informer goes beyond mere supplying of information or the mere introduction of the police to the appellant, but takes the extra mile of encouraging the target to induce the commission of a crime, courts are

of the view that he has metamorphosed into an agent provocateur. If that happens his evidence becomes admissible under s 40A of the same Act but naturally loses his protection under the abovementioned s 40.

[25] In this instant case, at the outset, it must be noted that the prosecution was at all time acting in good faith in not calling or offering the informer for cross-examination. They were aimed at protecting the identity of the police informer. Learned counsel for the appellant did not impute any 'discreditable conduct' on the part of the prosecution in not calling or offering the informer for cross-examination.

[26] Now, the protection of an informer is of fundamental importance to the working of a criminal justice system. Its rationale is to protect those who provide confidential information to the police from the risk of retribution, and more generally to encourage cooperation for future informers.

[27] The role of informers in drug — related cases is particularly important and dangerous. Informers often provide the only means for the police to gain some knowledge of the working of drug trafficking operations and networks. The investigation often will be based upon a relationship of trust between the police officer and the informer, something that may take a long time to establish. The safety, indeed the lives, not only of the informers but also of the undercover police officers will depend on that relationship of trust.

[28] The need to protect the identity of an informer has long been recognized by the courts in Malaysia and other jurisdictions. In Malaysia, an informer is entitled to the statutory protection under s 40 of the DDA. In particular, s 40(1) provides that no witness should be obliged or permitted to disclose the name or address of any informer or state any matter which might lead to his discovery. The informer is also protected from giving evidence. The prosecution is not required to call him or her as a witness or offering him or her to the defence. Failure to call him or her will not attract the application of adverse inference under s 114(g) of the Evidence Act 1950 against the prosecution's case (see the cases of *Wan Yurillhami bin Wan Yaacob & Anor v Public Prosecutor* [2010] 1 MLJ 749; [2010] 1 CLJ 1; *Munusamy Vengadasalam v Public Prosecutor* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336; [1987] 1 CLJ 540; [1987] CLJ (Rep) 241, *Public Prosecutor v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 233; *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433; [1995] 3 CLJ 1; *Ghazalee bin Kassim & Ors v Public Prosecutor* [2009] MLJU 402; [2009] 4 CLJ 737).

[29] In *R v Barros* [2011] 273 CCC (3rd) 129 (SCC), the Supreme Court of Canada observed as follows at para 30:

> Police rely heavily on informers. Because of its almost absolute nature, the privilege encourages other potential informers to come forward with some assurance of protection against reprisal. A more flexible rule that would leave disclosure up to the discretion of the individual trial judge would rob informers of that assurance and sap their willingness to cooperate. See *Bisaillon v Keable* [1983] 2 SCR 60; *R v Hunter* (1987) 57 CR (3d) 1 (Ont CA); *R v Scott* [1990] 3 SCR 979; *Named Person v Vancouver Sun* [2007] SCC 43; [2007] 3 SCR 253; Leipert; and Basi. The obligation to protect confidential sources clearly goes beyond a rule of evidence and is not limited to the courtroom. As the trial judge in this case put it, The police need help, but people who are available to provide information typically won't give that information to the police unless they are protected' (AR at 7).

[30] The principle is thus well accepted. Yet the rule cannot be absolute. Certainly, if the informer had assumed the mantle of an agent provocateur and had played a very active part from the very beginning up to the point to the arrest of the accused, he is not protected under s 40 of the DDA (see *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433; [1995] 3 CLJ 1, *Public Prosecutor v Monoharan a/l Ratnasamy* [1989] 1 MLJ 504; *Public Prosecutor v Padi bin Abdullah* [1989] 2 MLJ 60; *Public Prosecutor v Sivakumar Ammasi* [2003] 6 CLJ 152; *Public Prosecutor v Chong Chee Kin & Anor* [1995] 2 MLJ 679, *Lee Lee Cong v Public Prosecutor* [1998] 4 MLJ 697; [1999] 1 AMR 925; *Chan Chor Shuh v Public Prosecutor* [2003] 2 MLJ 26; [2008] 1 CLJ 501).

[31] While one can readily conceive of a situation where the line between the informer passing on information as to the activities of the accused and the informer actively inducing the accused to commit a crime could be blurred, this is not a situation in this instant case. Here, the case against the appellant was almost exclusively based on the evidence of SP3 and SP6. The uncontroverted evidence indicated that it was SP3 who negotiated with the appellant, for the appellant to sell 3kg of cannabis at RM2,200 per kg and later agreed to reduce the purchase price to RM2,000. It was SP3 who communicated with the appellant and fixed the place and date to effect the sale.

[32] We have scrutinised carefully the evidence in this case and we are satisfied that the informer has not assumed the role of an agent provocateur as his role was restricted to introducing SP3 to the appellant. He was not involved in any negotiations as to the type of drugs, quantity of drugs and the purchase price between the parties. Granted that both SP3 and SP4 did not deny that the informer was at the scene right from the beginning when he introduced SP3 to the appellant on 9 May 2006 at the Kampung Simpang Junction till the arrest of the appellant on 15 May 2006 night, nonetheless, the informer did nothing else apart from being present all the way. In any ordinary circumstances, the presence of the informer throughout the entire transaction would be able to lend credence to the dealing so as not to hit the suspicion button of either parties in the transaction (see *Public Prosecutor v Mansor bin Mohd Rashid &*

Anor [1996] 3 MLJ 560; *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336; *Tarmizi bin Yacob & Anor v Public Prosecutor and another appeal* [2011] 4 MLJ 1).

[33] The available evidence lends support to our conclusion. At p 36, para 20 of the appeal record, Vol I, SP3 explained the informer's role during the negotiation which took place on 9 February 2006 in the following terms:

> Kami bertiga dalam keadaan berdiri telah berbincang mengenai bekalan ganja. Jarak kami dengan sasaran lebih kurang 3 kaki, secara berhadapan.
>
> Pertemuan dan perbincangan di situ mengambil masa lebih kurang 10 minit. Sumber duduk atas motornya berada tidak jauh daripada kami berdua dan tidak campuri perbincangan saya dengan …
>
> (Emphasis added).

[34] What transpired during the handing over of the cannabis by the appellant to SP3 on 15 June 2006 was narrated by SP3 at p 42, para I, of appeal record, Vol I, as follows:

> Sebaik sahaja saya, sumber dan kawan OKT sampai di tahap 80 meter itu, OKT bercakap-cakap dengan kawannya itu dalam Bahasa Tamil, kawannya itu telah berjalan lebih 3 meter lagi ke atas daripada tahap kami berada.
>
> Kawasan cahaya pada tahap 80 meter itu — agak cerah dengan cahaya bulan dan boleh nampak kawan OKT. OKT dengan sumber ada berada bersama saya. OKT berada 3–4 kaki daripada saya.
>
> Lepas itu saya tanyakan OKT: Kenapa you punya kawan tunggu disana?
>
> OKT beritahu: Dia taktahu pun ini hal.
>
> Saya saja bawa mari, tak baik dia campur ini hal.
>
> Selepas itu, sumber saya arahkan supaya menemani kawan OKT dan tinggalkan saya dengan OKT sahaja berdua di situ.
>
> Saya tidak pernah dikenalkan dengan kawan OKT ini oleh OKT. Tiada mana-mana masa sumber aktif dalam perbincangan jual beli dadah ini.
>
> (Emphasis added).

[35] On the basis of the above reasons, the first ground of appeal advanced by the appellant should, therefore, fail.

Ground (b)

[36] Learned counsel for the appellant submitted that the learned trial judge erred when he failed to sufficiently appreciate the defence case. According to

learned counsel, the defence of the appellant was that the actual trafficker was one Thanasegaran and as such the learned trial judge ought to make a finding whether Thanasegaran is real or fictitious. This omission had disadvantaged the appellant.

[37] With respect, the submission is bereft of merit. Looking at the grounds of judgment in its entirety and in its correct perspective, we are satisfied that the learned trial judge had considered sufficiently the material evidence given on behalf of the defence, and having weighed it against the prosecution's case, he has come to the correct conclusion that the appellant's defence had not raised any reasonable doubt in the prosecution's case.

[38] At pp 9–13 of the appeal record, Vol I, the learned trial judge assessed the defence of the appellant in this manner:

> Kesimpulan keterangan saksi-saksi pembelaan secara ringkasnya merupakan suatu penafian penglibatan tertuduh yang cuba diletakkan kepada pihak ketiga iaitu Thanasegaran. Kepada saya keterangan saksi-saksinya ini adalah tertumpu kepada apa-apa yang berlaku sebelum kejadian bukan kepada episod penyerahan dadah itu sendiri. Dalihan nombor telefon nampaknya meleset sepertimana kupasan saya tadi. Begitu juga dengan dalihan penggunaan motosikal yang hanya dibuktikan bagaimana tertuduh boleh berada di atas motosikal itu setelah dijemput oleh 'Ayya'. Apa yang berlaku selepas itu tiada saksinya yang boleh katakan secara jitu. Keterangan DW5 hanya memberitahu penggunaan motosikal oleh Thanasegaran hanya setakat jam 10.20 malam sahaja dan tiada apa-apa keterangan daripadanya tentang apa yang berlaku dan kemana 'Ayya' pergi selepas daripada itu. Hanya keterangan DW3 yang mengatakan bahawa 'Ayya' atau Thanasegaran dilihat bersama-sama tertuduh membonceng keluar daripada hadapan rumahnya. Dia tiada pengetahuan tentang episod seterusnya yang dilakukan oleh mereka terutamanya oleh tertuduh sendiri.
>
> Dihujahkan oleh pembelaan isu ketidak-panggilan Thanasegaran adalah suatu yang memudaratkan kepada kes pendakwaan yang menimbulkan banyak tanda tanya. Sekiranya diimbas kembali versi keterangan pendakwaan, segala urusan transaksi jual beli dadah sebelum kejadian dikendalikan oleh SP3 dengan tertuduh sahaja. Barang diingat bahawa antara 2 pertemuan berkaitan, tertuduh telah menggunakan nombor talian telefon yang sama, motosikal yang sama dan minda masing-masing kepada urusan jual beli dadah yang sama.
>
> Tidak mungkin berlakunya kesilapan identiti sasaran di dalam kes ini.

[39] In the circumstances of the case, we are of the opinion that it is not necessary for the learned trial judge to make a specific finding whether Thanasegaran is a real trafficker or not because the identity of the person who negotiated the sale with SP3 and delivered the cannabis was not in doubt. That being the case, whether Thanasegaran was the real trafficker is immaterial.

[40] At p 18 of the appeal record, Vol I, the learned trial judge said: A

> Watak 'Ayya' menjadi kurang penting kerana terbukti individu yang menyerahkan dadah-dadah rampasan itu ditangkap sendiri oleh penyamar sulit pada malam kejadian, cuma kawannya sahaja yang berada jarak sedikit daripada tertuduh yang berjaya lepas lari. B

[41] Lest we be accused of an oversight, we must say that we are aware of the decision in *Yee Wen Chin v Public Prosecutor* [2008] 6 MLJ 222; [2008] 6 CLJ 773 and *Aedy bin Osman v Public Prosecutor* [2010] 1 MLJ 810; [2011] 1 CLJ 273 which held that if there is evidence adduced to demonstrate that someone else rather than accused was the real trafficker, then the trial judge should give consideration to this before arriving at a decision to convict the accused. C

[42] We have perused the evidence in the record. In our view, there was no credible evidence from which we could infer that Thanasegaran was the real trafficker. The uncontroverted evidence showed that the negotiations and telephone conversation regarding the selling of the cannabis were held between SP3 and the appellant. There was in fact delivery of the supply of the cannabis to SP3 by the appellant. The evidence of SP3 was corroborated by SP6 who testified that it was the appellant who orchestrated the whole plan and arranged for the delivery of the cannabis at Kampung Simpang Halt Junction on the night of 15 May 2006. D E

[43] In the upshot, it was clear that the meeting held six days later after the first meeting at Kampung Simpang Junction on 9 May 2006 was a follow-up of the plan agreed upon between the appellant and SP3 to effect the sale of the drugs. F

[44] In our judgment, the learned trial judge had hearkened to all these pieces of evidence and had rightly concluded that the appellant and not Thanasegaran, was the real trafficker. G

[45] Learned counsel for the appellant launched a strong attack on the failure of the learned trial judge to consider the appellant's cautioned statement ('D22'). According to learned counsel, D22 was in fact introduced by the appellant through SP7. The contents of D22 represent the core defence which he gave on 16 May 2006, the next day after he was arrested. It was the defence given at the very first opportunity, consistent with his oral testimony in court, yet found no consideration by the court. H I

[46] We have examined carefully D22 and it appeared that the contents of D22 were essentially similar to the defence put forth by the appellant during his testimony at the trial.

[47] As a matter of law, we agree that the learned trial judge must consider D22 because it is part of the appellant's defence. The learned trial judge must consider all the evidence which has been presented in the trial. It is for him to consider as to what weight, if any, should be given or what use should be made of it in considering the defence of the appellant.

[48] Concerning D22, the learned trial judge had this to say at p18 of appeal record, Vol I:

> Tambahan pula percubaan tertuduh untuk bergantung kepada pernyataan beramarannya tidak dapat saya pertimbangkan kerana walaupun kenyataannya meletakkan kesalahan ke atas kawannya Ayya namun gagal disokong oleh mana-mana keterangan saksinya.

[49] In our judgment, this is an error on the part of the learned trial judge. The law does not require the appellant's witness to corroborate the contents of the cautioned statement before it can be considered. The issue to be considered now is whether that error is fatal to the conviction so recorded against the appellant. We were invited by the learned deputy prosecutor to maintain the conviction in view of the 'overwhelming evidence' connecting the appellant with subject matter of the charge.

[50] In the circumstances of the case, we are prepared to hold that this error on the part of the learned trial judge will not ipso facto lead to the appeal of the appellant having to be allowed. In actual fact, no substantial miscarriage of justice has been occasioned by it. In our judgment, on the totality of the evidence upon which the learned trial judge based the conviction of the appellant, it is clear that any reasonable and rational tribunal would have been satisfied beyond reasonable doubt about the guilt of the appellant of the offence charged. Indeed, there was sufficient evidence to support the conviction of the appellant.

[51] We agree that we should invoke the provision of s 60(1) of the Courts of Judicature Act 1964, in particular the proviso thereto as was done in *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265; [1994] 2 CLJ 151, *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; [2001] 1 CLJ 381; *Public Prosecutor v Ishak bin Hj Shaari & Other Appeal* [2003] 4 MLJ 585; [2003] 3 CLJ 843.

[52] In the light of the similarity of D22 and the appellant's testimony at the trial, we are of the considered view that had the learned trial judge considered D22, his decision might not have been different. Therefore, the appellant had not been prejudiced in his defence by this omission.

[53] As a further string to the bow, it ought to be noted that it is trite law that a wholly self-serving or purely exculpatory statement made by an accused to the police is not generally in itself evidence of the truth of the facts stated therein though it may be admitted to show the reaction or attitude of the accused at the time when he or she made it (see *Mohamed Ismail bin Sahul Hameed v Pendakwa Raya* (Criminal Appeal No P05–193 of 2010 (unreported) (CA)); *Public Prosecutor v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 233; *Public Prosecutor v Adetunji Adeleye Sule* [1993] 2 MLJ 70; *Public Prosecutor v Chan Kim Choi* [1989] 1 MLJ 404].

CONCLUSION

[54] We are satisfied that the finding of the learned trial judge was amply supported by evidence and cannot be assailed. While we are persuaded that the learned trial judge erred in law in not considering the appellant's cautioned statement (D22), we are of the view that this error did not occasion any miscarriage of justice, given the fact that the contents of D22 were similar to the defence put forth by the appellant during the trial and given the fact that there was overwhelming evidence connecting the appellant with subject matter of charge. In the result, we find no merit in this appeal and accordingly we dismissed it. We have no doubt that the conviction is safe.

Appeal dismissed.

Reported by Afiq Mohamad Noor